Bee Ah Nya v Ooi Ah Yan

HIGH COURT (PULAU PINANG) — PETITION FOR JUDICIAL SEPARATION NO 33–514 OF 2004
S NANTHA BALAN JC
25 OCTOBER 2013

Civil Procedure — Contempt of court — Order of committal, application for — Breach of consent order — Whether statement accompanying application failed to give sufficient particulars of alleged breach — Whether there could be contempt arising out of breach of consent order — Whether consent order coercive in nature — Whether order contained any undertaking by respondent to court — Whether order ambiguous and lacked clarity — Whether proven beyond reasonable doubt that respondent had committed contempt of court — Rules of Court 2012 O 52 r 3(2)

Bee Ah Nya, the petitioner wife ('PW') had filed a petition for judicial separation against Ooi Ah Yan, the respondent husband ('RH'). Pursuant to the filing of the petition, the parties had come to an agreement and recorded a consent order ('the CO'). The main part of the CO dealt with the process of disposal of the matrimonial home (the property), which the PW was occupying. The CO provided that the RH would arrange for the valuation of the property followed by the sale of the property with the proceeds to be divided between the parties. Alternatively, the CO provided that the property would be sold to their son for the agreed sum of RM580,000. Subsequently, the RH entered into a sale and purchase agreement to sell the property to a third party for RM1,560,000. The PW claimed that the RH's refusal to sell the property to their son as agreed constituted an act of contempt. Consequently the PW filed an application for an order of committal against the RH for his failure to comply with the CO. The RH submitted that the statement accompanying the PW's application had failed to give sufficient particulars of the alleged breach. The RH further submitted that he had first priority in selling the property to the highest bidder, so as to obtain maximum yield and to pay off the outstanding loan to the financier.

Held, dismissing the application for committal with costs of RM2,000:

(1) The issue or problem in the present case was not one of failure of particulars in the statement accompanying the application filed under O 52 r 3(2) of the Rules of Court 2012. The alleged act of contempt was sufficiently pleaded and the RH was in no doubt that the charge of contempt was predicated on his refusal to sell the property to the son for the agreed sum of RM580,000 (see para 11).

(2) Based on the authorities cited, it was clear that although the failure to carry out the terms of a consent order would amount to a breach, not all consent orders could be enforced through committal proceedings. The issue of contempt would depend on the terms of that order. In certain well-defined and precisely worded consent orders, that is, where there is an undertaking that had been given to the court or where the consent order is otherwise of a coercive nature, the breach would constitute an act of contempt of court. In the present case, the CO did not contain any undertaking by the RH to the court but was instead more in the nature of a contract between the RH and PW regulating or stipulating the steps to be taken towards disposal of the property. Under the CO, it was entirely the duty of RH to take all the necessary steps to have the property valued and then disposed of. It was only as an alternative that the son was entitled to purchase the property at the agreed price of RM580,000. Hence on plain reading the CO was in pith and substance a contract or settlement agreement between the RH and PW and not a coercive order. As such, it was not capable of being enforced through committal proceedings (see paras 22, 28–30).

(3) Further, the CO was ambiguous and suffered from a lack of clarity as to the timelines for RH's obligations thereunder. In particular, it was unclear as to when exactly the alternative term of the CO crystallises such that the son became entitled to purchase the property. As such, and given the fact that these were quasi criminal proceedings with the serious consequence of deprivation liberty of an individual, the ambiguity was construed in favour of the RH. Thus it was held that the PW had failed to prove beyond reasonable doubt that the RH had committed contempt of court (see paras 37–38).

[Bahasa Malaysia summary

Bee Ah Nya, pempetisyen isteri ('PI') telah memfailkan petisyen untuk perpisahan kehakiman terhadap Ooi Ah Yan, responden suami ('RS'). Menurut pemfailan petisyen, pihak-pihak telah mencapai persetujuan dan telah merekod perintah kebenaran ('PK'). Bahagian utama PK berhubung kait dengan proses pelupusan rumah perkahwinan ('hartanah'), yang mana PI sedang mendiami. PK memperuntukkan bahawa RS akan menguruskan penilaian hartanah diikuti dengan penjualan hartanah dengan hasil untuk dibahagikan antara pihak-pihak. Secara alternatif, PK memperuntukkan bahawa hartanah akan dijual kepada anak lelaki mereka dengan jumlah dipersetujui sebanyak RM580,000. Selanjutnya, RS memeterai perjanjian jual beli untuk menjual hartanah kepada pihak ketiga untuk RM1,560,000. PI mendakwa bahawa RS gagal untuk menurut PK. RS berhujah bahawa kenyataan yang menyokong permohonan PI gagal untuk memberikan butiran yang mencukupi mengenai percanggahan yang didakwa. RS selanjutnya berhujah bahawa dia telah memberi keutamaan dalam menjual hartanah

kepada pembida tertinggi, untuk mendapatkan keuntungan yang maksima dan untuk membayar pinjaman yang tertunggak kepada pembiaya.

Diputuskan, menolak permohonan untuk pengkomitan dengan kos sebanyak RM2,000:

(1) Isu atau masalah di dalam kes ini bukanlah akan kegagalan tentang butiran di dalam kenyataan bersama permohonan yang difailkan di bawah A 52 k 3(2) Kaedah-Kaedah Mahkamah 2012. Tindakan penghinaan yang didakwa telah diplid dengan secukupnya dan RS tidak sangsi bahawa tuduhan penghinaan adalah berdasarkan keenggannya untuk menjual hartanah tersebut kepada anak lelakinya dengan jumlah yang dipersetujui sebanyak RM580,000 (lihat perenggan 11).

(2) Berdasarkan autoriti-autoriti yang dirujuk, adalah jelas bahawa meskipun kegagalan untuk melaksanakan terma perintah kebenaran membentuk percanggahan, bukan semua perintah kebenaran akan mengenakan prosiding-prosiding pengkomitan sedemikian. Isu penghinaan akan bergantung kepada terma perintah. Di dalam sesetengah perintah kebenaran yang telah didefinisikan dengan baik dan tepat, iaitu, yang mana terdapat akujanji yang telah diberikan kepada mahkamah atau di mana perintah kebenaran sebaliknya bersifat paksaan, percanggahan tersebut membentuk tindakan penghinaan terhadap mahkamah. Di dalam kes ini, PK tidak mengandungi apa-apa akujanji oleh RS kepada mahkamah tetapi sebaliknya lebih bersifat kontrak antara RS dan PI yang mengawal atau menyatakan langkah-langkah yang harus diambil dalam pembahagian hartanah. Di bawah PK, adalah menjadi tugas RS seluruhnya untuk mengambil langkah-langkah yang perlu untuk menilai hartanah dan kemudian melupuskannya. Ia hanyalah suatu alternatif bahawa anak lelaki berhak untuk membeli hartanah dengan harga yang dipersetujui sebanyak RM580,000. Justeru jika dibaca dengan ringkas PK dalam inti pati dan kandungan adalah suatu kontrak atau perjanjian penyelesaian antara RS dan PI dan bukanlah perintah berunsur paksaan. Oleh itu, ia tidak mampu dikuatkuasakan melalui prosiding-prosiding pengkomitan (lihat perenggan 22, 28–30).

(3) Tambahan PK adalah samar dan kurang jelas berkenaan dengan jangka masa kewajipan RS. Secara terperinci, ia kurang jelas tentang bilakah terma alternatif PK membayangkan di mana anak lelaki tersebut berhak membeli hartanah tersebut. Oleh itu, melihatkan fakta bahawa ini merupakan prosiding-prosiding jenayah quasi dengan akibat pelucutan kebebasan yang serius terhadap individu, kekaburan tersebut ditafsir berpihakkan RS. Justeru, adalah diputuskan bahawa PI telah gagal untuk membuktikan melampaui keraguan munasabah bahawa RS telah melakukan penghinaan terhadap mahkamah (lihat perenggan 37–38).]

Notes

For cases on order of committal, application for, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2105–2130.

Cases referred to

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1) [2005] 5 MLJ 489, HC (folld)
Dato' Seri Yusof bin Dato' Biji Sura @ Mohamad v BTM Timber Industries Sdn Bhd & Ors [2010] 1 MLJ 644, CA (folld)
Fortune Pacific Engineering Co Ltd v Gajatakraw Industries Sdn Bhd [2010] 5 CLJ 590, HC (refd)
Ladlay Mohan Mathur v RS Bhatnagar 1985 All LJ 17 (folld)
Lim Chau Leng v Wong Chee Chong [2006] 2 MLJ 269, HC (folld)
Societe Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd [2005] 4 MLJ 348, HC (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458, FC (refd)

Legislation referred to

Rules of Court 2012 O 52 rr 3(2), 4(1)

Clement Cheng (Clement, Dawn & Associates) for the petitioner.
Eddy Kwang (Kwang Lim & Azni) for the respondent.

S Nantha Balan JC:

INTRODUCTION

[1] The main legal issue that arose for consideration in this case is whether a breach of a consent order is capable of being construed as an act of contempt of court and consequently whether the party in breach is liable to committal proceedings. The other issue is whether a party can be in contempt of a consent order which is ambiguous.

[2] This is an application for committal by the petitioner/wife ('PW') against the respondent/husband ('RH') arising out of an alleged act of contempt which is said to have been committed by RH under a consent order dated 8 July 2010 ('the consent order').

BACKGROUND

[3] PW filed a petition in the High Court of Malaya at Penang for judicial separation against RH. Pursuant to the said petition for judicial separation,

PW and RH came to an agreement and they recorded the consent order. The terms of the consent order are as follows:

MAKA ADALAH DENGAN PERSETUJUAN DIPERINTAHKAN PADA HARI INI:

(a) bahawa Pempetisyen diberi pemisahan kehakiman daripada Responden Pertama;

(b) bahawa Raine & Home International Zaki & Partners Sdn Bhd dilantik untuk menilai harta kelamin yang dikenali sebagai No 7, Babington Avenue, 10400 Pulau Pinang yang didirikan di atas tanah yang dikenali sebagai Lot. No 1356, Seksyen 3, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang yang dipegang di bawah Geran No. 17209 ('Hartanah tersebut') dalam satu bulan dari tarikh Perintah ini;

(c) bahawa responden pertama menanggung kos penilaian Hartanah tersebut;

(d) bahawa Hartanah tersebut dijual pada harga minimum mengikut penilaian tersebut di atas Hartanah tersebut hanya boleh dijual di bawah nilai dalam penilaian tersebut atas persetujuan pempetisyen dan responden pertama;

(e) bahawa harga jualan Hartanah tersebut dibahagikan sama rata di antara pempetisyen dan responden pertama;

(f) bahawa wang tebusan pinjaman bank atas Hartanah tersebut yang ditetapkan pada RM650,000 dibayar daripada harga jualan Hartanah tersebut;

(g) bahawa jika harga jualan adalah kurang dari RM1,300,000 Pempetisyen adalah berhakkepada baki jualan bersih Hartanah tersebut;

(h) bahawa responden pertama bertanggung membayar apa-apa wang tebusan pinjaman bank melebihi RM650,000;

(i) bahawa pempetisyen memberi milikan kosong hartanah tersebut kepada peguamcara pempetisyen dalam masa sebulan darl tarikh perjanjian jual beli hartanah tersebut. pempetisyen bertanggung membayar apa-apa gantirugi kepada pembeli Hartanah tersebut jika Pempetisyen gagal memberi milikan kosong;

(j) bahawa sebagai alternatif kepada perenggan (b) hingga (i) di atas anak pempetisyen dan responden pertama, Ooi Gim How, diberi hak untuk membeli hartanah tersebut pada harga RM580,000. Apa-apa wang tebusan pinjaman bank yang melebihi RM580,000 ditanggung oleh responden pertama;

(k) bahawa pempetisyen tidak menuntut nafkah daripada responden pertama;

(l) bahawa pihak-pihak diberi kebebasan untuk memohon perintah lanjut daripada mahkamah ini;

(m) bahawa pihak-pihak menanggung kos masing-masing.

[4] The main part of the consent order pertained to the steps that were to be

taken by RH to arrange for a valuation of the matrimonial home to be conducted and thereafter sold and the proceeds divided between RH and PW (after payment of the amounts due and owing to the charge bank which was itself subject to a maximum redemption amount of RM650,000).

[5] The committal proceedings were taken against the RH in respect of the term of the consent order which stipulated in the alternative by way of clause (j) of the consent order, that the son of PW and RH, Ooi Gim How ('OGH') is entitled to purchase the matrimonial home for the pre-agreed price of RM580,000.

[6] As a fact, RH has entered into a sale and purchase agreement with a third party in order to sell the property for RM1,560,000. PW, who was and still is in occupation of the matrimonial home, maintains that OGH is entitled to purchase the property for RM580,000 as per the consent order and that RH's act of entering into a sale and purchase agreement with a third party and in refusing to sell the property to OGH constitutes an act of contempt.

[7] On 3 September 2013 PW filed a notice of application which was supported by PW's affidavit affirmed on 31 July 2013 under O 52 r 4(1) of the Rules of Court 2012 in order to cite RH for contempt of court based on the allegation that RH did not comply with the consent order. The statement filed pursuant to O 52 r 3(2) of the Rules of Court 2012 is critical as the grounds for committal are to be culled from the four corners of the statement. It was a very brief Statement but was to the point. It charged the RH with having committed contempt due to his failure to sell the property at No 7, Babington Avenue, 10400, Pulau Pinang to the son, OGH for the sum of RM580,000.

[8] The general principle is that disobedience of a court order can amount to contempt. Also, for a charge of contempt to succeed, it has to be proven beyond reasonable doubt. See: *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 (FC).

I will now deal with the submissions of the parties.

FAILURE TO STATE ALL THE PARTICULARS IN THE O 52 STATEMENT

[9] It was submitted by counsel for RH that under O 52 r 3(2) of the Rules of Court 2012 all the particulars must be set out in a statement when applying for leave to court for an order of committal. An order for committal may be declined when the statement in the notice of application does not contain sufficient information as to what the alleged breach is. It was submitted that PW had failed to give sufficient particulars in the statement such as the actual

owner of the property known as No 7, Babington Avenue, 10400 Penang ('the matrimonial home') and the title details of the matrimonial home as well as the actual valuation of the matrimonial home.

[10] In this context, counsel for RH referred *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112 where the court had decided as follows:

> ln the present motion the statement accompanying the notice of motion does not contain sufficient information as to what the alleged breach is all about Which term of the many terms in the order have they breached? Is it that they have not disclosed all their assets? Or that they have not disclosed the value of the assets? Or that they have not disclosed their full value? Or that they have not specified the nature of the assets? Or that the nature of the ownership of the assets have not been set out? And there are other questions which can be asked by the defendants who need to know with particularity what charge or charges they are faced with, charges which can land them in prison? No doubt the notice of motion has made reference to the affidavit of Moiz Tahir Ali and the affidavit has been served on the defendants but the point is that the document is a wholly separate document from the notice and the statement and its purpose is merely to verify the facts in the statement; it cannot supply the missing grounds which are required to be set out in the statement under r 2(2) of the RHC.

[11] In my view, the alleged act of contempt was sufficiently pleaded and RH was in no doubt that the charge of contempt was predicated on his refusal to sell the matrimonial home to OGH for the agreed sum of RM580,000. As such, I held that the issue or the problem was not one of failure of particulars in the O 52 statement but rather it was a problem which had to do with the terms of the consent order and the conduct of the parties after the consent order had been entered into. In my view, the lack of particulars in respect of the title to the matrimonial home and the valuation details are all quite irrelevant to the issue pertaining to RH's alleged act of contempt which was his refusal to sell the matrimonial home to OGH.

Whether there can be contempt arising out of a breach of a consent order

[12] This is the main issue that needs to be considered. The issue is simple enough and the short answer to it is: it all depends on the terms of the consent order. Of course, conceptually a consent order operates as a contract whereupon in the event of breach, the innocent party would have to take out separate proceedings to sue on the consent order as if it were a contract. But, if the terms of the consent order are such that there is either an express or implicit undertaking or a restraining order against the alleged contemnor, then notwithstanding that it may operate as a contract, a breach of the order may amount to contempt. In this regard, PW's counsel referred to several cases

concerning injunctions which were recorded or undertakings given by consent but such terms do not feature in the consent order. A

[13] The case on point in relation to enforceability of consent orders via committal proceedings is the decision of the High Court in *Lim Chau Leng v Wong Chee Chong* [2006] 2 MLJ 269 which arose out of matrimonial proceedings. In that case, the defendant/husband who had breached the consent order that was recorded and was facing a charge of contempt by the plaintiff/wife, raised the issue that a breach of a consent order dated 12 November 2003 made voluntarily between the defendant/husband and the plaintiff/wife through their respective counsel and recorded as such by the court cannot amount to a contempt of court. B C

[14] After construing the terms of the consent order in that case and considering all the authorities on point, the High Court ruled that the breach of the consent order by the defendant/husband did not amount to contempt. As such the committal proceedings were dismissed. D

[15] In that case, the court found that the terms of the consent order recorded by the court on 12 November 2003 were negotiated and agreed upon by the plaintiff and defendant before the matter was called up for full trial. As a result of the compromise reached by the parties out of court, the divorce petition was not contested and was disposed of without consideration and decision on merits. E F

[16] The court held that the order entered by consent with the plaintiff was an embodiment of the terms agreed between the parties before the trial of the divorce petition. But, it was not an order of the court in the true sense with directions. The court did not decide anything on merits. No decision or direction was made by the court on the hearing of the divorce petition. The court merely recorded the agreement of the parties and set the seal of the court on it. G

[17] It was further held that had the divorce petition been heard on its merits and the court had come to a finding of fact on all issues after having taken evidence and ordered the defendant to do all that is now found in the consent order, then that would be an order of the court which is in *coercive terms* and a *breach of which would attract committal proceedings for contempt of court*. It is not the spirit and intent of the law of contempt to punish a party who enters into a bargain with another and formalised before a judge, if that party subsequently fails to fulfil the terms of the bargain. H I

[18] The court concluded that failure to carry out the terms, although a breach, is not susceptible to contempt proceedings. The rationale for holding

thus is because the affront by breach is not to the court but the party to the compromise or consent order. The offence if any, is committed by one party against the other and not the court which negates the very foundation for proceeding for contempt of court.

[19] For present purposes it would suffice if I were to reproduce the synopsis of the judgment at p 270 of the judgment where it was held as follows:

> (3) The terms agreed upon came from the parties to the court and not from the court to the parties. It was never denied that the consent order with the seal of the court affixed to it made it a court order. But *it is not an order of the court with imperative directions or coerciveness*. It lacked coerciveness taking into account the manner the consent order came about (see para 10) *Badri Dass v Labhu Mai* AIR 1959 Punjab 322 referred.
>
> (4) In this case, there was a set of promise made by the defendant to the plaintiff to do or not to do an act. That is all. There were no promises made to the court by the defendant. The court merely acknowledged this agreement by affixing its seal which brought the suit to an end. The defendant by making these promises (and the plaintiff accepting them) did not hoodwink the court into bringing the suit to an end. The decision to compromise and to end the suit was entirely by the parties. The law of contempt of court does not envisage institution of committal proceedings for a breach of a term agreed by parties merely because it is embodied in a court order (see para 11).

[20] I will also refer to another case that was considered by the court in *Lim Chau Leng v Wong Chee Chong*, that is, *Ladlay Mohan Mathur v RS Bhatnagar* 1985 All LJ 17, which concerned a consent decree that was passed and in one of the clauses the tenant had given an undertaking to vacate premises in dispute as per the terms recorded therein. The tenant disobeyed the undertaking given and the landlord initiated civil contempt proceedings which was consequently rejected. The court ruled that, *'In cases of violation of compromise or order, no question of contempt of court arises but party has right to enforce the order of compromise by either executing the order or getting an injunction.'* The court had also referred to the opinion of David Foskett QC in his book titled, *The Law and Practice of Compromise*, (5th Ed), 2002, where he had this to say at p 194:

> It should clearly be understood that an order for committal can be made only where there has been an undertaking to the court.

[21] In the result the court in *Lim Chau Leng v Wong Chee Chong* found that the consent order was essentially a compromise between the parties which had been recorded before the court. It was neither coercive nor did it contain any undertakings by the defendant/husband such as to expose him to committal proceedings in the event he breached the terms of the consent order.

[22] Based on the authorities alluded to above, it is clear that not all consent orders are incapable of being enforced through committal proceedings. As I said earlier, it all depends very much on the nature and the effect of the terms of the consent order. Thus in some cases, breach of consent orders have resulted in successful enforcement via committal proceedings. This is demonstrated in the following cases where it shows that in certain well defined and precisely worded consent orders, that is, where there is an undertaking that had been given to the court or where the consent order is otherwise of a coercive nature, the breach of a such a consent order would constitute an act of contempt of court.

[23] In *Fortune Pacific Engineering Co Ltd v Gajatakraw Industries Sdn Bhd* [2010] 5 CLJ 590 the consent order was in the nature of an injunction, which the contemnors had breached and were accordingly found liable for committal.

[24] Next, in *Societe Jas Hennessy & Co & Anor v Nguang Chan (M) Sdn Bhd* [2005] 4 MLJ 348 the contemnor was found to have breached the consent order which contained an undertaking. So ultimately, it all depends on the nature and effect of the terms as contained in the consent order in order to ascertain whether it is coercive or has elements of an undertaking by the alleged contemnor or if it is an injunction order that was granted by consent, in which case, a breach of such an order would be an act of contempt and will invite the penal consequences of committal.

WHETHER THE CONSENT ORDER IS A COERCIVE ORDER

[25] In the present case however, the consent order is one which merely deals with the process of disposal of the matrimonial home and encompasses a two staged process. The only timeline that is imposed in respect of the two staged process is that Raine & Home International Zaki & Partners ('RHIZ') are to conduct a valuation of the property within one month from the date of the consent order ie on or before 8 August 2010.

[26] But even that timeline appears not to have been adhered to and all sides were quite happy to have the valuation done well after the one month period. It should be noted that by letter dated 23 September 2010 Ong & Manecksha served the sealed order on Messrs Koay & Co and stated, *Kindly proceed to obtain a valuation report on the subject property as per the court order dated 8 July 2010.* It cannot be disputed that RH did in fact obtain a valuation report from RHIZ dated 13 December 2010 wherein the market value was determined at RM1,560,000.

[27] Later and purportedly acting under clause (j) of the consent order, OGH, the son of PW and RH intimated that he wanted to buy the property at

RM580,000 But then RH has since entered into a sale and purchase agreement dated 1 August 2013 for the sale price of RM1,560,500. RH insists that he has first priority in selling the property to the highest bidder, so as to obtain maximum yield and to pay off the outstanding loan to the financier. PW is still occupying the property and so it is in her interest that OGH do purchase the property so that she can continue staying on in the property.

[28] In my view, the consent order did not contain any undertaking by RH to the court but was instead more in the nature of a contract between RH and PW regulating or stipulating the steps to be taken towards disposal of the matrimonial home all which said obligations fell on RH. But that was what he had agreed to.

[29] Under the consent order, it was entirely the duty of RH to take all the necessary steps to have the matrimonial home valued and then disposed of. It was only as an alternative that OGH was entitled to purchase the matrimonial home of his parents at the agreed purchase consideration of RM580,000.

[30] Hence, on a plain reading, it appeared to me that the consent order was in pith and substance a contract (settlement agreement) between RH and PW. In any event, even if I am wrong and the consent order is capable of being construed as either expressly or implicitly containing an undertaking by RH in relation to the disposal of the matrimonial home, I find that there is a hurdle for PW and it has to do, first, with the interpretation of the terms of the consent order and second, with the conduct of the parties.

Ambiguity in the consent order

[31] First, I find that the terms of the consent order are at best vague and ambiguous as regards timelines for compliance. For instance, one cannot tell from the consent order when exactly OGH becomes entitled to purchase the matrimonial home of his parents. It appears that time was generally at large for all the terms save one.

[32] Next, even the timeline that was stipulated for one of the terms whereby RH was to obtain a valuation report from RHIZ within one month from the date of the consent order was set at large by the conduct of the parties. In this regard I am referring to the letter dated 23 September 2010 from Messrs Ong & Manecksha by which a copy of the consent order was served on RH's previous solicitors with a note that RH should proceed to obtain the valuation for the matrimonial home, albeit that the timeline for doing so had lapsed.

[33] Also, it is quite clear that there is no cut off period for paras (a) to (i) of the consent order. At any rate I am of the considered view that whatever may be

said by the two parties as to their clients respective entitlements or OGH's entitlement vis-a-vis the disposal of the matrimonial home, the consent order is certainly not free from interpretative difficulty and there is an inherent ambiguity and such ambiguity as exists must be construed in favour of RH since committal proceedings are quasi criminal in nature.

[34] Counsel for PW made a valiant attempt at disambiguating the terms of the consent order but ultimately it did not achieve its purpose as the ambiguity remained extant right till the end. As I said, if there is any ambiguity, then the ambiguity works in favour of the contemnor. This appeared to be the approach which was taken by Mr Justice Dato' Hj Abdul Malik Ishak (as he then was) in *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 1)* [2005] 5 MLJ 489 where he dismissed the committal proceedings against the alleged contemnors on the grounds, inter alia, that, 'the ex parte injunction order dated 1 December 2003 is *unclear and ambiguous* — disparity between the Malay language version and the English language version and so *any doubt should be given to the alleged contemnors, who are the defendants here, bearing in mind that the standard of proof required in contempt of court proceedings is beyond reasonable doubt* (Emphasis added.)

[35] Hence, where the order (regardless of whether it is a consent order or a coercive order made by the court) suffers from any lack of clarity or is ambiguous, then the benefit of doubt has to be given to the alleged contemnor. In this regard it would be relevant to refer to the decision of the Court of Appeal in *Dato' Seri Yusof bin Dato' Biji Sura @ Mohamad v BTM Timber Industries Sdn Bhd & Ors* [2010] 1 MLJ 644 (CA) where the court upheld the decision of the High Court which had dismissed a committal application holding that if the order itself is ambiguous then it is not capable of being enforced by committal. This how the Court of Appeal put it at p 655 of the judgment; 'The learned judge was clearly right in stating that an order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. See *Arlige, Eady & Smith on Contempt*, (2nd Ed), paras 12–43 p 746'.

[36] In the circumstances and upon applying the principles as above-stated, I was of the view, first and fundamentally, that the consent order operates as a contract and not a coercive order. Also, it does not contain any undertaking by RH with regards to the obligations thereunder. As such, it is not capable of being enforced through committal proceedings.

[37] Secondly, there is in any event, ambiguity or a lack of clarity as to the timelines for RH's obligations thereunder. In particular, it is unclear as to when

exactly the alternative term of the consent order crystallises such that OGH becomes entitled to purchase the matrimonial home of his parents.

[38] As such, and given that these are quasi criminal proceedings with the serious consequence of deprivation of liberty of an individual, I construed the ambiguity in favour of RH and gave him the benefit of the doubt.

THE OUTCOME

[39] In the result, I held that PW had failed to prove beyond reasonable doubt that RH had committed contempt of court. As such, the application for committal was dismissed. I also ordered PW to pay costs of RM2,000 to RH. Since PW had failed in this proceedings RH is therefore entitled to proceed with the sale of the matrimonial home to the third party in which case PW has to vacate the matrimonial home. Under para (i) of the consent order, PW has to give vacant possession of the matrimonial home no later than one month from the date of the sale and purchase agreement. In these circumstances, and with the approval of RH it was agreed that time be extended to allow her to stay for a slightly longer period in order for her to make suitable alternative arrangements. As such, by consent of the parties para (i) of the consent order was varied as follows,

> bahawa pempetisyen memberi milikan kosong Hartanah tersebut kepada peguamcara pempetisyen pada atau sebelum 25 November 2013. pempetisyen bertanggung membayar apa-apa gantirugi kepada pembeli Hartanah tersebut jika pempetisyen gagal memberi milikan kosong.

Order accordingly.

Application for committal dismissed with costs of RM2,000.

Reported by Kohila Nesan